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Answers to Questions Posed By The House Select Committee on Private Property Rights

October 12, 2005

The staff of the House Select Committee on Private Property Rights has asked the Florida Association of Counties, among other interested parties, to answer the following questions:

1. What changes in Florida law are necessary to prohibit takings of private property for the sole purpose of economic development? Please define economic development.

2. What changes to the statutory definitions of "slum area" and "blighted area" in Florida's Community Redevelopment Act are necessary to define conditions sufficient to justify taking of private property for the public purpose of eliminating and preventing the recurrence of slum or blight conditions?

3. Under what circumstances, if any, is it appropriate for local governments to take private property from one property owner and transfer it to another private party for the public purpose of eliminating and preventing the recurrence of slum or blight conditions?

4. If the Legislature adopts more stringent definitions of slum and blight for the purpose of eminent domain, what statutory changes are necessary to ensure that community redevelopment agencies may continue to designate areas as slum or blighted for purposes of tax increment financing?

5. In cases involving a taking under Florida's Community Redevelopment Act, what level of deference should Florida courts show to local government determinations?

The Florida Association of Counties has begun the process of establishing its policy positions on these questions and on the issues raised by the Select Committee staff in September; the Association will finalize as many positions as possible in early December. At this point, the Association is continuing its commitment to upholding the protections for private property rights for Floridians and to following and preserving the procedural and substantive safeguards that exist through Florida's current law. The Association also believes that this long history of Florida law already protects Floridians from a *Kelo*-type taking outside the confines of the Community Redevelopment Act, Chapter 163, Part III, Florida Statutes. In addition, while the community redevelopment agencies are useful mechanisms for eradicating slum and blight conditions, there may be some statutory changes that could occur inside the confines of the Community Redevelopment Act that would promote additional safeguard and accountability measures for property owners affected by the creation and activities of community redevelopment agencies. Accordingly, the Florida Association of Counties' answers to questions 2 and 4, as articulated by the Select Committee staff, will be provided primarily in the response to question 2.

1. What changes in Florida law are necessary to prohibit takings of private property for the sole purpose of economic development? Please define economic development.

Any coerced taking of private property in Florida must be proven to be taken for a valid public purpose – regardless of the articulated label placed upon the act of the taking. Florida's current constitutional, judicial and statutory protections prohibit a county from exercising its power of eminent domain for any purpose that is not a public purpose. In addition, the current law in Florida protects property owners from taking private property when that taking is primarily for a private purpose.

The public purpose requirement is

> the means provided by the constitution for an assertion of the public interest and is predicated upon the proposition that the private property sought is for a necessary public use. It is this public nature of the need and necessity involved that constitutes the justification for the taking of private property, and without which proper purpose the private property of our citizens cannot be confiscated, for the private ownership and possession of property was one of the great rights preserved in our constitution and for which our forefathers fought and dies; it must be jealously preserved within the reasonable limits prescribed by law.

Baycol, Inc. v. Downtown Development Authority, 315 So. 2d 451, 455 (Fla.1975)(prohibiting the development authority from taking private property for the purpose of allowing private retail development in air space above a parking garage yet to be constructed). A private benefit that is incidental to the public purpose does not eliminate an otherwise predominate public purpose. "The mere fact that someone engaged in private business for private gain will be benefited by . . . [a] public

improvement undertaken by the government or a governmental agency, should not and does not deprive such improvement of its public character or detract from the fact that it primarily serves a public purpose." State v. Board of Control, 66 So. 2d 209, 210-11 (Fla. 1953).

Furthermore, neither the Florida Legislature nor a local government can declare a private purpose to be a public one and by that declaration circumvent the constitutional protections. "There are certain limits beyond which the Legislature cannot go. It cannot authorize a municipality [or a county] to spend public money or [condemn property]. . ., directly or indirectly, . . . for a purpose which is not public. A legislative determination may be persuasive, but it is not conclusive." State v. Town of North Miami, 59 So. 2d 779 (Fla. 1952).

Florida law does not contain an express constitutional or statutory section that either authorizes or prohibits the use of eminent domain for "economic development". In addition, there is no reported appellate decision in Florida that has analyzed the issue of using the power of eminent domain for "economic development" purposes. However, the general the law in Florida is quite clear and extraordinarily real. Eminent domain is prohibited for the purpose of "economic development," however defined, unless the condemning authority proves that (1) the "economic development" was a valid public purpose; that (2) the property was reasonably necessary for the public purpose; and that (3) full compensation was paid to the property owner.

Accordingly, the focus of the more specific comments for this question will be on the Community Redevelopment Act (as discussed in questions 2, 3, 4, and 5 below) because that Act is the closest that articulated Florida statutory law gets to specific "economic development" and "eminent domain" purposes.

2. What changes to the statutory definitions of "slum area" and "blighted area" in Florida's Community Redevelopment Act are necessary to define conditions sufficient to justify taking of private property for the public purpose of eliminating and preventing the recurrence of slum or blight conditions?[1]

Florida's Community Redevelopment Act, created under Chapter 163, Part III, Florida Statutes, recognizes that the prevention and elimination of slum or blight is a matter of state concern so that the state, its counties, and municipalities do not continue to be endangered by areas which are focal centers of disease, that promote juvenile delinquency, and that consume a disproportion of public revenues because of the extra services required for police, fire, accident, hospitalization, and other forms of public protection, services and facilities. See sec. 163.335(1), Fla. Stat. In furtherance of eradicating these grave societal conditions, the Florida Legislature has empowered local governments[2] to create community redevelopment agencies, conferring on them

[1] The response to this question is also applicable to question 4.

many powers, including the power to expend public money and to condemn property in furtherance of the redevelopment plan. See sec. 163.335(3), Fla. Stat.

The Supreme Court of Florida has also concluded that the exercise of eminent domain in furtherance of the purposes of that Act can be constitutional. The Supreme Court in State v. Miami Beach Redevelopment Agency, 392 So. 2d 875 (Fla. 1980), concluded that the Florida Legislature's determination that redevelopment projects using eminent domain to clear blighted areas and to provide for the ultimate disposition of substantial portions of acquired properties for use of private concerns served a public purpose, was not conclusive but was presumed valid and should be upheld unless it was arbitrary or unfounded or so clearly erroneous as to be beyond power of the Legislature. The Court stated:

> We hold that chapter 163, Florida Statutes (1977), authorizing redevelopment projects involving expenditure of public funds, sale of public bonds, the use of eminent domain for acquisition and clearance, and substantial private and commercial uses after redevelopment, is in furtherance of a public purpose and is constitutional.

Id. at 891.

However, the courts in Florida have also pointed out that "the power of eminent domain cannot be used arbitrarily and unreasonably and . . . although a city 'may designate an area as a slum . . . such designation does not make it a slum.'" Rukab v. City of Jacksonville Beach, 811 So. 2d 727, 731 (Fla. 1st DCA 2003)(quoting City of Jacksonville v. Moman, 290 So. 2d 105, 107 (Fla. 1st DCA 1974)). In fact, in Rukab, the First District Court concluded that there was no legal support for the argument that the property owners were precluded from asserting their constitutional rights within the eminent domain proceeding because they bought their property subject to the previous determination of blight. "A property owner must . . . be afforded the opportunity for a full hearing in the eminent domain action . . . and the [governmental entity] must meet the burden of showing public purpose and necessity." Id. at 733.

The current definition of "blighted area" allows a community redevelopment agency ("CRA") to be established once it is shown that: (1)"a substantial number" of deteriorating structures exist in the area that lead to either economic distress or that endanger life or property; and that (2) the area contains two factors out of 14, including mere defective or inadequate street layout, parking facilities, roadways, bridges, or public transportation facilities. See sec. 163.340(8), Fla. Stat. Other factors include, but are not limited to, unsanitary or unsafe conditions; deterioration of site and other improvements; inadequate and outdated building density patterns; falling lease rates

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[2] The ability of counties to control, or even participate in, the creation and activities of municipally-created community redevelopment agencies is statutorily limited and for non-charter counties, not existent at all. In addition, as of January of 2005 there were 144 community redevelopment agencies in Florida, of which only 19 were created by counties; the remaining 125 were municipally-created. See LCIR Report, "Local Government Concerns Regarding Community Redevelopment Agencies in Florida," Jan. 2005.

compared to the remainder of the jurisdiction; and residential and commercial vacancy rates higher than the rest of the jurisdiction. See id.

The power of eminent domain under the current CRA law is tied to the creation of a CRA. Accordingly, changes to the statutory definitions of "slum area" and "blighted area" for the creation of a CRA would also apply to the exercise of eminent domain and to the expenditure of public money under the CRA law. There are several ways in which the statutory definitions, particularly of "blighted area" could be changed: "substantial number" could be quantified or amended to state "predominance of" or "majority of"; the requirement for "two or more" factors could be changed to require a higher number of factors; the findings of slum and/or blight could be required to be updated periodically by the CRA; and requirements for special notice and public hearings could be created before the resolution of necessity creating the CRA under section 163.355, Florida Statutes, could be adopted.

In addition to these statutory changes, there are enhanced accountability measures that could statutorily be created. For example, current law, with limited exceptions for some charter counties, does not authorize counties to participate in the creation or operation of CRAs established by municipalities inside the counties. Accordingly, the tax investment of the counties (and thus, the county taxpayers), is contributed to the municipally-created CRAs, without oversight or approval. Requiring appropriate intergovernmental coordination of the entities that contribute to the tax increment financing would necessarily assist in narrowing the use of eminent domain. For example, a statutory change could be enacted to require that all taxing authorities that must contribute to the tax increment of the CRA agree to the creation of the CRA and, thereby, to the exercise of its powers, including eminent domain. Such a circumstance adds layers of accountability to the creation process by empowering all of the directly impacted elected public officials to participate in the creation and operation of the CRA in their jurisdictions.

3. Under what circumstances, if any, is it appropriate for local governments to take private property from one property owner and transfer it to another private party for the public purpose of eliminating and preventing the recurrence of slum or blight conditions?

The Supreme Court of Florida and the Florida Legislature have long believed that the power of eminent domain may be exercised to clear slum areas and to redevelop those areas so as to avoid a recurrence of the slum condition and the evils attendant to that area, regardless of whether the redeveloped land is held by a public entity or whether the redeveloped land is transferred to private development. The public purpose of clearing slum areas and preventing their recurrence is the dominant and primary purpose for the exercise of eminent domain in these circumstances; the redevelopment of the area is the subordinate purpose. For example, in 1959, the Supreme Court upheld an act of the Florida Legislature that allowed the City of Tampa to condemn 40 acres of slum area within the city and immediately transfer the title to the private purchaser for development according to the plans and specifications required under the project plan. The Court in Grubstein v. Urban Renewal Agency of the City of Tampa, 115 So. 2d 745 (Fla. 1959), noted that "the use to be made of the condemned

property is fixed and definite and control of such use is retained by the condemning authority; . . . slum clearance is the dominant or primary purpose . . . ., and redevelopment of the cleared property is the subordinate purpose[.]"

When the conditions of the slum or blighted area rise to the level of creating a menace to the public health, safety and welfare of the citizens of the state, then it may be appropriate to use eminent domain for the public purpose of removing the slum area and preventing the recurrence of the slum condition. In addition, in a "blighted area," there may be permanent, inherent, and fundamental defects in land within an area that prevent any use of the land, let alone any efficient or desirable use, thus rendering the land dysfunctional. These permanent defects create a disproportionate burden on the local taxpayers to continue to try to improve the conditions of the area. When the regulatory or police power fails to cure such an inherent permanent defect, the power of eminent domain may be necessary to serve the valid public purpose of removing the defect. However, the power of eminent domain should only be used after other methods of curing the defect have been repeatedly tried and have failed.

4. If the Legislature adopts more stringent definitions of slum and blight for the purpose of eminent domain, what statutory changes are necessary to ensure that community redevelopment agencies may continue to designate areas as slum or blighted for purposes of tax increment financing?

A more complete analysis of this question is contained within the response to Question 2 above. If, however, the Florida Legislature were to dissect the powers of a CRA and only statutorily narrow the definitions of "slum area" and "blighted area" as they apply to the power of eminent domain in the CRA context, then the Legislature would need to ensure that the ability of a CRA to execute the adopted redevelopment plan is not rendered impossible thereby. The redevelopment plan is generally financed through the issuance of debt against which is pledged the estimated tax increment. Those estimates are based upon the complete and successful execution of the redevelopment plan.

The Florida Association of Counties recognizes that the charge of the Select Committee is to address concerns regarding the protection of private property rights. However, the Association would be remiss if it did not notify the committee that other problems exist within community redevelopment agencies beyond the power of eminent domain. Current law allows municipalities to create community redevelopment agencies in non-charter counties without any intergovernmental participation from the county which must then contribute its tax increment to the community redevelopment agency. The Association has been seeking legislative solutions to this current statutory scheme and believes that any solution to the excessive use of powers given to the community redevelopment agencies must address the intergovernmental issue as well.

5 . In cases involving a taking under Florida's Community Redevelopment Act, what level of deference should Florida courts show to local government determinations?

Some concern has been raised as to the fact that in the *Kelo* decision, the United States Supreme Court deferred to the legislative finding that economic development

was a public purpose for purposes of eminent domain. This deference to local government legislative findings also exists in Florida and has for many decades. However, such deference is not a blank check and in Florida no legislative body can make by fiat that which it is not. In other words, in Florida, actual evidence would be needed -- to prove a legislative declaration that economic development was a public purpose -- before the courts would defer to the finding. "[T]he legislative statement of public purpose deserves some degree of deference, [but] the ultimate question of the validity of that public purpose is a judicial question to be decided by a court of competent jurisdiction. See Dept. of Transportation v. Fortune Federal Savings & Loan Assoc., 532 So. 2d 1267, 1269 (Fla. 1988)(upholding sec. 337.27(3), Fla. Stat. (1985) which allows state agencies to condemn more property than is necessary when the state agency saves money by doing so).

Furthermore, neither the Florida Legislature nor a local government can declare a private purpose to be a public one and by that declaration circumvent the constitutional protections. "There are certain limits beyond which the Legislature cannot go. It cannot authorize a municipality [or a county] to spend public money or [condemn property]. . ., directly or indirectly, . . . for a purpose which is not public. A legislative determination may be persuasive, but it is not conclusive." State v. Town of North Miami, 59 So. 2d 779 (Fla. 1952).

While legislative findings, whether made by a county commission or by the Florida Legislature or by another public body with legislative discretion, are entitled to judicial deference they are judged on a case-by-case basis and they are subject to challenge and defeat. The Florida jurisprudence is filled with circumstances and cases under which a private citizen has proven that a legislative finding or act was arbitrary and in so doing, invalidating the entire governmental action.

In the context of the community redevelopment agencies, the courts in Florida have already declared that legislative findings of slum or blight are not impenetrable for all CRA purposes. "[T]he power of eminent domain cannot be used arbitrarily and unreasonably and . . . although a city 'may designate an area as a slum . . . such designation does not make it a slum.'" Rukab v. City of Jacksonville Beach, 811 So. 2d 727, 731 (Fla. 1st DCA 2003)(quoting City of Jacksonville v. Moman, 290 So. 2d 105, 107 (Fla. 1st DCA 1974)). In fact, in Rukab, the First District Court concluded that there was no legal support for the argument that the property owners were precluded from asserting their constitutional rights within the eminent domain proceeding because they bought their property subject to the previous determination of blight. "A property owner must . . . be afforded the opportunity for a full hearing in the eminent domain action . . . and the [governmental entity] must meet the burden of showing public purpose and necessity." Id. at 733.